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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1968

No. 206

CONTINENTAL OIL COMPANY,

*Appellant,*

v.

UNITED STATES OF AMERICA,

*Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

## JURISDICTIONAL STATEMENT

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## JURISDICTIONAL STATEMENT

### OPINIONS BELOW

The opinion delivered orally by the District Court on October 11, 1967 (App. A, *infra,* pp. 1a-8a), is unreported. The District Court's decision, dated November 17, 1967 (App. B, *infra,* pp. 9a-10a), is reported at CCH, 1967 Trade Cases ¶ 72,292. That decision incorporated by reference: (1) the District Court's prior decision rendered on September 7, 1965 (App. C, *infra,* pp. 11a-25a), which is reported at CCH, 1965 Trade Cases ¶ 71,557; and (2) all of the parties' stipulations as to facts (1st, 2nd, 3rd and 4th Stips. of Facts; 1st, 2nd and 3rd Stips. as to Certain Documents).[1]

[1] "Instead of making any further detailed findings and conclusions, the Court does hereby adopt the findings and conclusions previously made insofar as they are not in conflict herewith and as they are modified by this decision . . . The Court does adopt all of the stipulations of the parties as facts in this case, in addition to those which the Court has found" (*infra,* p. 10a).

## JURISDICTION

This suit by the United States was brought pursuant to Section 15 of the Clayton Act, 38 Stat. 736, as amended by 62 Stat. 909, 15 U.S.C. § 25, alleging that an acquisition made by the defendant, Continental Oil Company, was in violation of Sec. 7 of the Clayton Act, 38 Stat. 731, as amended by 64 Stat. 1125, 15 U.S.C. § 18.

The judgment of the District Court (App. D, *infra*, pp. 26a-30a) was entered on February 21, 1968. Continental Oil Company filed its notice of appeal on April 3, 1968. The time for docketing the appeal was extended by order of Mr. Justice White to June 20, 1968.

The jurisdiction of this Court is conferred by § 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. § 29. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 304 *et seq.*

## QUESTIONS PRESENTED

The ultimate question to be determined is whether the acquisition by Continental Oil Company from Malco Refineries, Inc., of a single manufacturing facility (a crude oil refinery at Artesia, New Mexico) violated Section 7 of the Clayton Act. Subsidiary to such ultimate question are the following:

1. Whether the acquisition here in suit was justified and lawful because of the presence of "mitigating factors," *Brown Shoe Co.* v. *United States*, 370 U.S. 294 at 319, 346, which the court below erroneously refused to consider because it construed *United States* v. *Von's Grocery Co.*, 384 U.S. 270, 277, as having overruled *Brown Shoe*.

2. Whether the unopposed and admittedly bona fide complete divestiture prior to trial of the entire marketing

operation, which had been part of the original transaction in controversy, eliminated and rendered moot all issues arising out of the acquisition of that marketing operation.

3. Since the only asset acquired and retained by the defendant is a manufacturing plant (a refinery) which sells a fungible product (gasoline) *in bulk* to other manufacturers and independent marketers, whether it is proper to treat as part of the defendant's "share" of the *retail market* the resales made by those other manufacturers and independent marketers through their own distribution channels and under their own brand names.

## STATUTE INVOLVED

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. § 18, provides in pertinent part:

> ". . . no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition . . . may be substantially to lessen competition, or to tend to create a monopoly."

## STATEMENT OF THE CASE

On May 1, 1959, Continental Oil Company ("Continental") acquired the following assets from Malco Refineries, Inc. ("Malco"): (a) a relatively small petroleum refinery at Artesia, N. M.; (b) a pipeline gathering system that supplied the refinery with crude oil; and (c) a marketing operation that disposed of the refinery's finished products (GX 49, 50). On May 16, 1961, the United States ("Government") filed this suit alleging that the acquisition violated Section 7 of the Clayton Act. Subsequent events greatly simplified the issues:

The crude oil pipeline phase of the acquisition was eliminated by the Government's withdrawal of all issues with respect to crude oil as a separate "line of commerce" (Stip. Narrowing Issues; Pre-Trial Order ¶¶ 17, 18 (c). The parties further agreed that the single "line of commerce" involved herein is gasoline (7/10/63 Pre-Trial Tr. pp. 9, 14, 24; Pre-Trial Order ¶ 18 (f)).

The marketing phase of the acquisition was eliminated on July 1, 1965, when Continental, after notice to the Government, completely divested itself of the entire Malco marketing operation, including all retail outlets, customer accounts, goodwill, brand names, trademarks, etc. (CONX 152, 153; Pre-Trial Order ¶¶ 21, 22, 24).

Thus, the only part of the acquisition remaining in controversy consists of the manufacturing facilities; to wit, the former Malco refinery.

**A. Prior Proceedings**

This case is now here for the third time; but on neither of the prior appeals did this Court hear, consider or determine the merits of the controversy. Continental has yet to have its day in this Court.

Continental was twice victorious in the court below. In September 1963, the late District Judge Waldo H. Rogers granted Continental's motion for summary judgment. In May 1964 this Court vacated such judgment on the authority of *Poller* v. *Columbia Broadcasting Systems, Inc.*, 368 U.S. 464, and remanded the cause "for a trial on the merits of the case." *United States* v. *Continental Oil Co.*, 377 U.S. 161.

The trial on the merits was held, as directed, before District Judge H. Vearle Payne (Judge Rogers having meanwhile died) during July 1965. On September 7, 1965, Judge Payne rendered his decision (*infra*, pp. 11a-25a), concluding "that the United States has failed to prove the material

allegations of its complaint and that the complaint should be dismissed." Judgment was entered accordingly on September 20, 1965; but it was vacated by this Court — again without a hearing — and the action was once more remanded, this time "for further consideration in light of *United States* v. *Pabst Brewing Co.*, 384 U.S. 546." *United States* v. *Continental Oil Co.*, 387 U.S. 424.

Continental conceded thereafter that, in line with the holding in *Pabst*, the State of New Mexico alone should be viewed as the "section of the country" applicable to this case.

Both parties moved for judgment on the record, without offering any additional evidence. In disposing of these motions, Judge Payne ruled as follows:

1 A sentence in *United States* v. *Von's Grocery Co.*, 384 U.S. 270, 277, overruled, in effect, the doctrine of *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 319, 329, 346, with respect to "mitigating factors" and renders all evidence of such factors "immaterial" (*infra*, p. 3a).

2. Continental's complete divestiture of the Malco marketing operation made no difference, because " a substantial joinder of companies that have or have had this market . . . is inherently bad" (*infra*, p. 4a).

3. The second remand of this case was tantamount to a direction by this Court to enter judgment in favor of the Government, (*infra*, pp. 1a-2a, 5a, 9a-10a).

Judge Payne nevertheless adhered to all findings of fact he had made in his 1965 decision (insofar as they did not conflict with, or were not modified by, his 1967 decision) and also adopted as facts in the case all of the facts stipulated to by the parties (*infra*, pp. 5a, 7a-8a, 10a).

The judgment now here on appeal was entered February 21, 1968 (*infra*, pp. 26a-30a).

## B. The Uncontroverted Facts

Most of the essential facts in this case were agreed to in four Stipulations of Fact, or were proved by contemporaneous writings authenticated by three Stipulations as to Documents. Further undisputed facts were testified to by witnesses at the 10-day trial. The District Judge heard all of the evidence presented by both sides (*infra*, p. 13a), and, based thereon, made extensive findings of fact in his 1965 decision. No additional evidence has since been adduced.

### 1. Continental and its moribund New Mexico refinery

In 1959 Continental ranked 12th among all domestic oil companies in terms of net assets and sales of refined products (3rd Stip. of Facts ¶ 3), but 20th in operable refining capacity (CONX 157).

Continental's principal source of supply for the New Mexico market was a very small (4,000 barrels daily capacity) refinery at Artesia, N.M. It ranked 14th among the 19 principal refineries supplying New Mexico with gasoline (1st Stip. of Facts, ¶ 2(a), as amended); yet its output furnished 80% of Continental's total product requirements in the State (GX 21, 31, 36).

As early as 1955, a study indicated that this little plant was so old and inadequate that it could not be profitably operated beyond 1960 (GX 4). By 1959 it was on the verge of being shut down and abandoned because of obsolescence (Tr. 688-690, 699-701, 703-704). The possibility of modernizing and enlarging this plant was studied, but could not be justified economically (Tr. 586-587, 678). Accordingly, Continental gave serious consideration to the alternative of withdrawing completely from the New Mexico market (Tr. 579, 588, 617, 700, 704, 710, 712, 713-714).

**2. Malco's refinery operation — a failing enterprise**

Malco was a closely held corporation, used by Mr. Robert O. Anderson and members of his family to engage in the oil business. After 1957, the refining end of the business consisted of one 11,500 barrel-a-day plant at Artesia, N.M. (2nd Stip. of Facts ¶ 2). When Continental acquired that plant, it ranked 11th among the 19 principal refineries supplying the New Mexico gasoline market (1st Stip. of Facts ¶ 2(a), as amended).

For a while, the Malco refining operation was successful; but in the mid-1950's Malco began losing substantial volumes of business (Tr. 771; CONX 82, pp. 4). Its losses were particularly heavy in New Mexico, where sales of gasoline to jobbers, distributors and consumers declined more than 50% in only four years, dropping from 47.6 million gallons in 1955 to 23.4 million in 1958 (2nd Stip. of Facts ¶ 4; 1st Stip. of Facts ¶ 10).

There were two principal causes for Malco's loss of so much of its most profitable business: first of all, several new pipelines were constructed after 1954, thereby enabling many large refineries in West Texas and Southern California to lay down gasoline in the market centers of Albuquerque, El Paso, Tucson and Phoenix at far cheaper cost than the tank-truck freight charges Malco had to absorb (1st Stip. of Facts ¶ 3(a); Tr. 794-795; CONX 81; CONX 82, p. 4).[2]

The second cause of the decline in Malco's sales was an invasion of the area by several strong new competitors, some of whom sought and obtained independent jobber

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[2] Continental, of course, was also adversely affected; indeed, neither Malco nor Continental, with isolated refineries at Artesia — hundreds of miles away from the only metropolitan markets in the area — could continue to compete successfully after much bigger refineries gained cheap pipeline access to those markets (Tr. 578-579, 672, 678, 702-703, 709, 714-717, 741-742).

accounts in direct competition with Malco (Tr. 794-795; CONX 82, p. 4).

The decline in Malco's sales volumes, together with chaotic market conditions, practically wiped out Malco's profits (Tr. 781-782; CONX 82, pp. 3-4). Its pre-tax net income from refinery operations fell from $1,573,936 in 1957 to only $71,737 in 1958 (1st Stip. of Facts ¶ 20). This sharp decrease in profitability occurred, moreover, despite investments totaling some $2.5 million for purposes of modernizing the Malco Refinery and, hopefully, keeping it competitive (Tr. 766, 792-793; CONX 82, p. 3). As Mr. Anderson testified: "We actually put into the plant as much or more than we generated"; by 1958 the refinery operation had become "marginal"; "We were really spinning our wheels" (Tr. 763, 766-767, 793; CONX 82, p. 3).[3]

Confronted by the prospect that the Malco refinery operation would fail, Mr. Anderson began early in 1958 to explore every avenue for disposing of his company's Artesia plant (Tr. 762, 778-779). He approached six major oil companies, including Continental, with a view to selling out (Tr. 788-789).[4] He felt that Continental would be particularly interested because he knew that it was encountering considerable difficulty in operating its little, antiquated refinery also located at Artesia (Tr. 763).

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[3] Malco investigated the possibility of enhancing its ability to compete by building its own pipeline to El Paso and connecting it there with the lines running north to Albuquerque and west to Tucson and Phoenix (GX 3). But Mr. Anderson decided that the risk was too great; he was unwilling to make a pipeline investment of at least $2 million in an attempt to maintain his company's waning competitive position (Tr. 697-680, 770-773, 783).

[4] The other companies approached were Humble Oil & Refining Company, Union Oil Company of California, Sinclair Oil Corporation, Standard Oil Company of Indiana and Gulf Oil Corporation.

### 3. Combination of the Artesia refineries; investments and arrangements to keep them operating; disastrous financial results

Mr. Anderson's effort to interest Continental in acquiring the Malco refinery entailed protracted negotiations and deliberations for more than a year (Tr. 656-721). Continental twice flatly rejected the proposal (Tr. 663-665, 692-693), but finally concluded that there was one feasible solution to the difficult problems at hand: to combine and improve the Malco and Continental plants at Artesia and thereby create a modern 15,500 barrel-a-day refinery, big enough to realize economies of scale and to justify laying a 154-mile products pipeline to El Paso, where connections with existing lines would provide economical transportation to the area's other metropolitan centers (Tr. 579-580).

Success of this plan depended on Continental's ability to retain the patronage of most of Malco's customers (Tr. 583, 684). To be economical, the combined refineries at Artesia and the new products pipeline to El Paso would both have to operate at or near capacity (Tr. 596, 597). Continental's own product requirements in the area could absorb only about one-third of the enlarged refinery's output (Tr. 687, 697). Hence the necessity for retaining the business of Malco's customers, who consisted chiefly of independent jobbers and distributors having no contractual ties with Malco, and who were therefore free to switch at will to some other supplier (Tr. 608, 631, 692, 1004).

In order to keep the patronage of these Malco jobber-distributors, Continental formed a subsidiary (Malco Products, Inc., Delaware) and staffed it with the entire former Malco sales force, with instructions to continue to supply the Malco customers exactly as they had been supplied before (Tr. 583-584, 591, 598, 600-601, 709). These instruc-

tions were carried out (Tr. 591-592, 721-723, 790, 900). As a result, the Malco jobbers and distributors continued to compete in the market place just as vigorously as they had in the past; after the acquisition, both the number of Malco retail outlets and the volume of gasoline they dispensed increased significantly (1st Stip. of Facts ¶¶ 10, 11, 17).[5]

By combining and improving the Artesia refineries, laying the products pipeline to El Paso, and constructing pipeline terminals at El Paso, Albuquerque, Tucson and Phoenix, Continental preserved both of the Artesia plants as competitive sources of supply in the area. To accomplish this necessitated capital outlays by Continental of almost $6 million (1st Stip. of Facts ¶ 21).

Despite those heavy investments, however, the "Malco" operation sustained net *losses* of $836,000 in 1960 and $761,000 in 1961, or a total of almost $1.6 million for those two years (1st Stip. of Facts ¶ 23).[6]

### 4. Gasoline supplies for the New Mexico market

At the time of the acquisition in suit, total refining capacity being operated inside New Mexico amounted to less than 29,000 barrels per day; but gasoline was being supplied to the State by at least 19 refineries whose aggregate operating capacity exceeded 300,000 barrels daily

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[5] By contrast, the number of "Conoco" branded outlets and the volume of gasoline they retailed both decreased (1st Stip. of Facts ¶¶ 12, 16, 17).

[6] While Continental was able to withstand this sizeable loss, it seems doubtful, to say the least, whether Mr. Anderson would have kept the Malco refinery running if he had not leased it to Continental and thereby avoided the ensuing financial disaster.

(1st Stip. of Fact ¶ 2 (a), as amended). The 11,500 B/D Malco refinery represented about 3.8% of the total; and Continental's 4,000 B/D plant represented only 1.3% (*Id.*). But even these relatively small percentages (5.1%, combined) magnify the importance of the acquisition in suit, because — unless the two Artesia refineries had been consolidated — the Continental plant would have been shut down and junked within the next two years.

Furthermore, in addition to the 300,000 B/D of operating refinery capacity supplying gasoline to New Mexico, approximately 46,000 B/D of operable refining capacity was not even being used — about 4,000 B/D of such standby capacity being located inside New Mexico and a further 42,000 B/D lying just across the border in West Texas CONX 161, 162).

After the acquisition in suit, additional refining capacity, both inside and outside of New Mexico, began supplying the State with gasoline (1st Stip. of Facts ¶ 2(d)).

Most of the major units in the vast West Texas refining complex imported gasoline into New Mexico via pipeline (1st Stip. of Facts ¶¶ 3(a), 4(a), 4(b) as amended: CONX 82, CONX 159).[7] Additional large volumes of gasoline were

[7] The refineries referred to are as follows:

| Refinery | Location (West Texas) | 1/1/59 Op. Capacity (barrels per day) |
|---|---|---|
| El Paso Nat. G. P. | Odessa | 13,500 |
| Phillips | Borger | 71,000 |
| Shamrock | Sheerin | 21,000 |
| Standard of Texas | El Paso | 50,400 |
| Texaco | Amarillo | 19,000 |
| Texaeo | El Paso | 16,000 |
| | | 190,900 |

shipped into New Mexico by truck or rail.[8]

In 1959, the pipelines feeding into New Mexico had an aggregate daily capacity of 21,800 barrels, which equaled 80% of the total gasoline consumption in the State (Tr. 1590, 1617-1618). Such pipeline capacity could, if required, be readily enlarged (Tr. 1614-1618).

Out-of-state refineries played an increasingly important role in supplying the gasoline needs of New Mexico. In 1958 (the year before the acquisition in suit), over 285 million gallons of gasoline were imported, equivalent to more than 75% of the gasoline consumed there during that year (1st Stip. of Facts ¶¶ 1, 4(a)). By 1961, the imports had mounted to over 374 million gallons, which exceeded 90% of the year's New Mexico gasoline consumption *(Id.)*.

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[8] To the extent that origins of such shipments could be identified, their sources included all six of the refineries listed above in footnote 7, plus the following:

| Refinery | Location | 1/1/59 Op. Capacity (barrels per day) |
|---|---|---|
| American Petrofina | Wichita Falls, Tex. | 10,000 |
| Ben Franklin | Ardmore, Okla. | 12,000 |
| Col-Tex | Big Spring, Tex. | 12,000 |
| Continental | Denver, Colo. | 13,600 |
| Cosden | Colorado City, Tex. | 30,000 |
| Oriental | Alamosa, Colo. | 900 |
| Petroleum Ref. | Leuders, Tex. | 2,000 |
| | | 80,500 |

### 5. Complete divestiture of the "Malco" marketing operation

Early in June 1965, in an effort to settle this protracted and costly litigation, Continental offered to divest itself of all the marketing assets and business it had acquired from Malco in 1959, and to assure the purchaser of such assets of adequate supplies of petroleum products under a long-term contract. After consideration, the Government rejected this settlement proposal (Tr. 16-18).

Nevertheless, prior to the trial, Continental proceeded with the divestiture (CONX 152-155). Advance notice thereof was given to the Government, which interposed no objection to consummation of the divestiture and later conceded that it was a bona fide transaction (Tr. 15; Pre-Trial Order, ¶¶ 21-24).

Effective July 1, 1965, Continental sold and divested itself of all the marketing assets, business, goodwill, brand names and trademarks which had been acquired from Malco in 1959 (CONX 152, 153). The purchaser was a New Mexico corporation, all of whose stock was owned by Mr. C. A. Copple and his sons. Continental retained neither any financial interest in it nor any power of control over it.[9] At the same time, Continental entered into a Product Supply Contract with the Copples' company, the effect of which was to give the latter a call on the Artesia refinery

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[9] The asset sale agreement specifically provided that its intent and purpose was that the purchaser ("New Malco") would carry on the Malco marketing operation "entirely apart from Continental and without Continental's having any ownership interest in, or power of control over, New Malco or its business activities, policies or practices" (CONX 152; Pre-Trial Order ¶ 24).

(or any other source of supply Continental might have in the area) for petroleum products, including gasoline, for the next ten years (CONX 154, 155). In order to assure the Copples' company of adequate product supplies, Continental undertook to furnish each year up to 103% of the volume of each respective product purchased by the Copples' company during the preceding year. But the contract imposed no obligation whatever to buy products from Continental; on the contrary, the Copples' company was left entirely free to obtain products from any other source.[10]

## C. The District Court's Findings of Fact

Based on the uncontroverted record proof outlined above, and without requesting or receiving suggested findings from either side, Judge Payne made the following, among other findings of fact:

*As to mitigating factors*

"Malco Refineries Incorporated was a marginal operation which was casting about to find a purchaser . . . the Continental refinery had a life expectancy of only about two years and, . . . Continental felt that the only practical solution was to combine the two refineries" (*infra*, p. 25a).

"The Court heard the witnesses testify concerning the purpose of the acquisition as well as concerning the manner in which the new refinery was used by Continental after the acquisition . . . Continental did not acquire the property for the purpose of strengthening its position in its standard branded gasolines, nor did it use the property acquired for that purpose" (*infra*, pp. 21a-22a).

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[10] The contract specifically provided: ". . . nothing herein contained shall be deemed to prevent or limit Malco's right to purchase petroleum products . . . from any supplier of petroleum products other than Continental."

". . . the intent of Continental in acquiring the property in question was not to stifle competition . . . Continental did not acquire . . . for the purpose of increasing its sales or influence as a major company . . ." (*infra*, p. 25a).

"Malco Products, Inc., a Delaware corporation, was operated by Conoco exactly as it or its predecessor had been operated before the acquisition. It was an active competitor on the market and operated just as it did before . . ." (*infra*, p. 17a; to same effect, *infra*, pp. 21a, 22a, 25a).

*As to Continental's divestiture of the Malco marketing operations*

"Furthermore, prior to trial, Continental transferred to a Mr. Copp'e and his sons the entire stock, ownership, possession and control of the distribution portion of the acquisition. There were no conditions nor ties of any kind so that the distribution portion of the business acquired is no longer under the control of Continental. In that connection, Continental has agreed to furnish the gasoline supply to Malco, now owned by the Copples, for a period of years. This agreement is such that it cannot be cancelled by Continental. Malco is left free to purchase gasoline anywhere it may desire. There is, however, a provision that Continental will furnish only the amount of gasoline purchased in each previous year plus 3% . . . This contingency . . . does not take away the independence of Malco in any degree" (*infra*, p. 22a).

*As to gasoline supplies for the New Mexico market*

". . . the production of the two refineries in question, even if combined, is not the ultimate test in determining whether or not competition is lessened . . . The Court cannot look to the production alone in New Mexico and shut its eyes to the importation of gasoline from other areas in determining the effect of the acquisition . . ." (*infra*, p. 18a; to similar effect, p. 19a).

"In addition . . . there is a practice of exchanging gasoline between companies which affects enormous supplies of gasoline . . . The testimony indicated that this system is used widely in the industry. In other words, the source of supply is often enlarged to wide areas by the exchange of products. This enlarges the number of suppliers and minimizes or eliminates concentration or control by a few.

"In order to determine the effect on competition it is necessary then to determine what the supply of gasoline may be for the relevant market area. This cannot be determined by the refineries in New Mexico alone but must be determined from a practical standpoint, considering any refineries which may, in the usual course of business, supply the area" (*infra*, pp. 19a-20a).

After describing in detail the several refineries which supplied gasoline to New Mexico and the pipelines through which such supplies were transported to market (*infra*, pp. 20a-21a), Judge Payne went on to find:

"There was no evidence to show that the existing pipe lines were running to capacity. The Court finds that if they were they could easily and cheaply enlarge their capacity to meet greater and further demands on the supply" (*infra*, p. 21a).

"The amount of gasoline being imported into the relevant market area seems more than adequate to provide a source of supply for any company desiring to purchase" (*infra*, p. 22a).

In his second (1967) decision herein, Judge Payne neither withdrew nor modified any of the findings above quoted. On the contrary, he adopted and reaffirmed them all (*infra*, p. 10a).

## THE QUESTIONS ARE SUBSTANTIAL

### A. Here at stake is the "mitigating factors" doctrine approved by this Court only six years ago in the Brown Shoe case

In its present posture, the case at bar holds, in effect, that when a corporation's manufacturing plant wears out, it may not legally be replaced by acquiring an existing plant which is up for sale; that the corporation's only lawful alternatives are: (a) to build a new plant, or, if that cannot be justified economically, (b) to withdraw from the manufacturing business in that section of the country.

This holding is, on its face, a paradox; for since a prime objective of Section 7 of the Clayton Act is to prevent substantial lessening of competition, that objective is bound to be frustrated if the effect of Section 7 is to drive manufacturers out of business. It is not surprising, therefore, to find that the current holding in our case runs counter to carefully considered pronouncements of this Court in the leading case of *Brown Shoe Co.* v. *United States,* 370 U.S. 294. Pains were taken there to point out: that in amending Section 7 in 1950, "Congress recognized the stimulation to competition that might flow from particular mergers" (at p. 319); that in merger cases, a "most important such factor to examine is the very nature and purpose of the arrangement" (at p. 329); and that particular mergers should be upheld if "mitigating factors" are present, "*such as* the business failure or the inadequate resources of one of the parties that may have prevented it from maintaining its competitive position" or "a demonstrated need for combination to enable small companies to enter into more meaningful combination with those dominating the relevant markets" (at p. 346; emphasis supplied).

Abundant and compelling "mitigating factors" were clearly present in the case at bar. Continental was about to be forced out of the business of manufacturing petroleum products for the New Mexico market, because the company's tiny refinery at Artesia had become obsolete and would soon have to be abandoned. Malco's relatively small neighboring plant was likewise in distress: it had lost over half of its most profitable business in the State and was not generating enough earnings to cover essential outlays for plant upkeep. Both of the Artesia refineries had been rendered non-competitive by new pipelines which enable much bigger refineries in West Texas to dominate the New Mexico market, because they could deliver products there at a fraction of the trucking costs Continental and Malco had to bear. Consequently, the Artesia refining operations of both Continental and Malco were threatened with extinction.

The only feasible alternative to an early demise for the two plants was to combine them, modernize them, and connect them by means of pipelines and terminals to market centers — all at a cost of about $6 million. Mr. Anderson was understandably unwilling (if, indeed, he was able) to throw that much good money after the $2.5 million he had already sunk in the Malco refinery. Continental, on the other hand, was both willing and able to take the gamble — and did so, with the result that both Artesia refineries were kept running and made capable of competing on even terms with the big units in the West Texas refinery complex. Competition was thereby perpetuated and enhanced. The precise objective of Section 7 of the Clayton Act was achieved.

In the court below, Judge Payne misapprehended the significance of a passing comment he found in *United States v. Von's Grocery Co.*, 384 U.S. 270, 277, when he stated:

> "Now, in the *Von's Grocery Company* case the Supreme Court said this: 'This merger cannot be defended on the ground that one of the companies was about to fail or that the two had to merge to save themselves from destruction by some larger and more powerful competitor.'
>
> "In other words, whether or not a merger takes place because one company is about to go under or both about to go under, is immaterial. I think the same would be true in the case before the Court; whether or not Malco was about to go under [or Continental's Artesia refinery] would only last a couple of years, in the light of this *Von's Grocery Company* case would be immaterial. I took all of that into effect in [arriving] at my other decision" (*infra*, p. 3a).

Thus, observance of the legal principal of "mitigating factors" caused Judge Payne to decide — correctly, we say —in favor of Continental in 1965. But rejection of that principal, on the mistaken notion that it had been repealed by *Von's Grocery*, led to his diametrically contrary decision in 1967. This manifest error, we submit, alone calls for reversal of the judgment now here on appeal.

**B. Presented here are novel and important questions as to the effect of Continental's unopposed and admittedly bona fide divestiture, prior to trial, of the Malco marketing operation**

The Government's main contention in this case is that, by means of the 1959 acquisition from Malco, Continental increased its "share" of the New Mexico retail gasoline market by about 6%.[11] The fact remains, however, that on

[11] The exact amount of such increase is in dispute. According to the stipulated figures, on which Judge Payne relied (*infra*, p. 17a), Malco's share of the New Mexico retail gasoline market in 1958 was 6.2% (1st Stip. of Facts, ¶¶ 1, 10). A higher percentage (6.74%) was shown in GX 69; but on cross examination of the Government witness who prepared that exhibit, his figures were thoroughly discredited (Tr. 307-316, 318-319). Judge Payne refused to make any findings based on these padded figures (*infra*, p. 10a), although requested to do so by the Government (Plaintiff's Amended Proposed Findings Nos. 23-26).

July 1, 1965, Continental relinquished the entire additional "market share" by complete divestiture and surrender of all ownership in, and control over, the Malco marketing operation.

Continental no longer possesses the former Malco "market share"; that part of the original acquisition now belongs to, and is exclusively controlled by, the Copples' wholly independent company. Consequently, the fact that Continental at one time — for a period that expired three years ago — enjoyed the Malco "market share" now has no bearing whatever upon the only question still at issue in this case, namely: whether Continental is entitled to continue to lease and operate the Malco refining facilities at Artesia.

Today, the Copples' company not only owns and controls all of the former Malco marketing assets (including service stations, goodwill, brand names and trademarks), but is also guaranteed a 10-year supply of gasoline from the Artesia refinery or any other product supply source Continental may have in New Mexico. The "Malco" jobbers and distributors therefore now enjoy a far more certain independent source of gasoline supply, through the Copples' company, than was ever available to them before.

The Government has sought to avoid the realities of this situation by arguing that the marketing operation divestiture should be ignored; that "legality under Clayton Act § 7 still must turn on probabilities at the time the acquisition took place, and not what actually transpired under the control of the defendants" (Government's memo of 8/30/67 in support of proposed judgment, p. 4). But that is not the law. It has long been established that the courts will take cognizance of present economic realities. See: *United States* v. *DuPont & Co.*, 353 U.S. 586. Post-acquisition evi-

dence is clearly admissible and should be considered. *F. T. C.* v. *Consolidated Foods Corp.*, 380 U.S. 592, 598. Courts should, and do, give effect at any time to the fact that an issue in litigation has become moot. *United Public Workers* v. *Mitchell*, 330 U.S. 75, 88.

Led into error by the Government's unsound position, Judge Payne refused in 1967 to consider the vitally important effect of Continental's divestiture of the "Malco" marketing operation (*infra*, p. 4a). This clearly erroneous ruling requires, we submit, a plenary review of the case by this Court.

### C. It was improper to treat retail sales by other refiners and independent marketers as part of Continental's "share" of the New Mexico retail gasoline market

Continental's complete divestiture of the marketing operation acquired from Malco, including all trademarks and brand names, left Continental with no control of any nature over the retail market share supplied by independent "Malco" jobbers. Continental's only relationship to such independent jobbers, as well as to other refiners reselling under their own brand names, is that of a supplier in bulk of a completely fungible, unbranded product.

This case is thus solely a manufacturing level case. However, the Government has refused to differentiate between the manufacturing level and the retail level of the market and has attributed to Continental all gasoline sold at retail under the Malco trademarks and brands — which Continental no longer owns or controls — and that purchased and resold at retail by other refiners, such as Humble, Gulf, Mobil, Sinclair, *et al*, under their respective brands. *Indeed, the Government did not even attempt to prove what mar-*

*ket share Continental and Malco possessed of refinery level sales on the wholesale market.* Instead, the Government relied exclusively on purported "shares" of the retail market. To arrive at impressive looking figures, it combined wholesale refinery level sales (including sales to other refiners, such as Humble, Gulf and other majors, and to independent marketers) and retail sales (including gasoline purchased by Continental and Malco from other refiners and resold at the jobber or retail level) and then related these conglomerate figures to total retail sales in New Mexico. The percentages and rankings thus obtained are mathematically unsound and distort proper economic analysis. Sales at the refinery level are simply not mathematically or economically equivalent to sales on the retail market. As this Court recognized in *Brown Shoe Co.* v. *United States,* 370 U.S. 294, combinations at different industry levels of a line of commerce bring into play different considerations.[12] Thus, analysis of a combination at the manufacturing level must differ from that of a combination at the retail level. See 370 U.S. at 328 and 336-339. In spite of the clear lesson of *Brown Shoe,* the Government limited its proof to the

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[12] In one important respect, the case at bar is the converse of *Brown Shoe.* There, "the acquisition of Kinney by Brown resulted in a horizontal combination at both the manufacturing and retailing levels of their businesses." The District Court found that the combination of the *manufacturing* facilities "was economically too insignificant to come within the prohibitions of the Clayton Act." However, it found that the horizontal combination at the retail level did violate the Act. The Government took no appeal from the District Court's findings about the manufacturing facilities, so only questions as to the retail level combination reached this Court. See 370 U.S. at 335.

In our case, on the other hand, the only questions remaining at this time are those pertaining to combined manufacturing facilities. All questions about consolidation of marketing assets have been eliminated and rendered moot by Continental's concededly bona fide divestiture of the whole Malco marketing operation.

retail market and ignored the manufacturing level of the industry.

The District Court's conclusion on remand that this acquisition violated Section 7 was predicated on acceptance of the Government's contentions that the effect of the divestiture of the Malco marketing operation could not be considered, and that Continental, by virtue of the acquisition, controlled almost 17% of the New Mexico retail market (*infra*, p. 4a). This premise — that the competitive effect of this merger can be assessed by simply looking at the New Mexico retail market — constituted the heart of the Government's case. That would perhaps be proper in a horizontal combination of retailing operations. However, this premise can be maintained in the case at bar only by ignoring the economic effect of Continental's complete divestiture of the Malco marketing operation, including the brands and trademarks, and attributing to Malco a share of the retail market based on its refinery level wholesale sales, while ignoring the manufacturing level of the market.[13]

Improper analysis of a manufacturing level case, involving only the supply side of the market, as if it were a simple horizontal retail merger, merits plenary review.

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[13] The Government's position that *U. S.* v. *Von's Grocery Co.*, 384 U.S. 270 and *U. S.* v. *Pabst Brewing Co.*, 384 U. S. 546, support the use of such an analysis is mistaken. *Von's* was a simple horizontal merger at the retail level involving "two large retail grocery companies in Los Angeles." This Court was not concerned with the manufacturing level of the relevant line of commerce. *Pabst* involved the beer industry, where there is extremely high product differentiation by brands. When Pabst acquired the Blatz manufacturing facilities, it necessarily acquired an unrelinquishable control of the Blatz distribution operations, because Blatz wholesalers and retailers could turn to no one else for Blatz beer. By contrast, in our case Continental has divested itself of all the Malco brands. Wholesalers and retailers who had been utilizing Malco brands or other brands can obtain the fungible commodity, gasoline, from any modern refinery or from the new and independent Copple's Company.

**D. Continental's acquisition of the Malco refinery had no substantial adverse effect upon competition**

Granting that New Mexico alone may be deemed to be the relevant *market* area for purposes of this case, still the boundaries of that State neither logically nor in fact delineate the relevant *supply* area. "Market share" percentages necessarily become of secondary importance in a Section 7 case if the sole asset acquired and retained by the defendant is a manufacturing plant, and the single "line of commerce" involved is a fungible product. In such a case — and this is it — the basic question is; What effect (if any) did the acquisition have upon the *supply* of the product for the particular market? That, in turn, calls for an inquiry as to the alternative sources of supply; and it is thoroughly immaterial whether such other sources happen to be located inside or outside of the "relevant market area."[14]

We have already reviewed the facts of record concerning the numbers, locations and sizes of the refineries furnishing New Mexico with gasoline, and the means by which they deliver that product to market (*supra*, pp. 10-12). In summary, the undisputed proof shows that most of the gasoline consumed in New Mexico comes from outside the State; that the bigger West Texas refineries ship in huge volumes via pipelines; that in 1959 the aggregate refining capacity supplying the New Mexico market exceeded 300,000 barrels per day; that Continental's nearly defunct little plant at Artesia represented only about 1.3% of this total; and that the relatively small Malco plant accounted for but

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[14] Plaintiff's trial counsel frankly admitted: "that the location of refineries are not significant in themselves unless they relate to the competition in the market or the section of the country we are talking about. *That is, we are not confined to refineries in the State of New Mexico*" (Hearing of 7/11/67, Tr. p. 11).

3.8%. In this perspective, the significance (or, rather, insignificance) of the acquisition in controversy is seen to be of *de minimis* proportions.

Moreover, the record is clear that the effect of the acquisition was actually to perpetuate and intensify competition; for otherwise the two doomed refineries at Artesia would have ceased to be competitive sources of gasoline supply for the New Mexico market.

## CONCLUSION

For the foregoing reasons, we respectfully submit that probable jurisdiction should be noted.

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